



Office of the Attorney General
State of Texas

DAN MORALES
ATTORNEY GENERAL

January 31, 1995

Mr. Stephen L. Braun
Bracewell & Patterson, L.L.P.
South Tower Pennzoil Place
711 Louisiana Street, Suite 2900
Houston, Texas 77002-2781

OR95-040

Dear Mr. Braun:

You ask whether certain information is subject to required public disclosure under the Texas Open Records Act, chapter 552 of the Government Code. Your request was assigned ID# 29563.

The Montgomery Independent School District (the "school district") received a request for "a copy of the attorney's report on the investigation into the Hoefft's parent complaint." You assert that the requested report is excepted from required public disclosure based on sections 552.101, 552.103, 552.107(1), and 552.111 of the Government Code.

Section 552.101 of the Government Code excepts from required public disclosure information made confidential by law. You raise this exception in conjunction with the informer's privilege. The informer's privilege permits a governmental body to protect from disclosure the identity of an individual who reports a violation of the law to a law-enforcement agency or to administrative officials having a duty of inspection of law enforcement within their particular spheres. *See* Open Records Decision No. 515 (1988).

The report lists the individuals with whom interviews were conducted and from whom statements and documents were received. The report does not contain copies of any employee statements. Nor does the report contain a reference to a particular employee statement in which that employee reports that someone has violated a law. The complaint, which is an attachment to the report, contains an allegation of a violation of law, but you inform us that the complaint has been released to the public. Since the investigation report does not reveal the identity of anyone who has reported a violation of a crime, the school district may not withhold the report from disclosure based on the informer's privilege aspect of section 552.101. *See id.*

Section 552.103 of the Government Code excepts from required public disclosure information that relates to pending or reasonably anticipated litigation to which a governmental body is a party. *See* Open Records Decision No. 588 (1991). You assert that the school district expects to be made a party to litigation because it has received several threats of civil litigation. You also state that criminal charges concerning an allegation in the complaint were filed with the City of Montgomery Police Department.

Evidently, there has not been an arrest. An arrest is not by itself sufficient to establish that litigation is reasonably anticipated. *See Heard v. Houston Post Co.*, 684 S.W.2d 210 (Tex. App.--Houston [1st Dist.] 1984, writ ref'd n.r.e.). Additionally, section 552.103 is applicable only where litigation involves or is expected to involve the government body claiming the exception. *See* Open Records Decision No. 392 (1983). We do not understand, nor do you explain, that the school district will be a party to criminal litigation. Moreover, the findings in the report do not support the conclusion that criminal litigation is likely to ensue. We, therefore, conclude that the school district has not established that criminal litigation is reasonably anticipated.

We turn to the possibility of civil litigation. Section 552.103 requires concrete evidence that the claim that litigation may ensue is more than mere conjecture. Open Records Decision No. 518 (1989). A mere threat to sue is not sufficient to establish that litigation is reasonably anticipated. *See* Open Records Decision No. 331 (1982). There must be some objective indication that the potential party intends to follow through with the threat.

On the other hand, several threats to sue and the hiring of an attorney for the purpose of carrying out the threat is evidence that litigation is reasonably anticipated against a governmental body. *See* Open Records Decision No. 288 (1981). Moreover, when an attorney for the potential opposing party makes a demand for disputed payments and threatens to sue if suitable payments are not made promptly, the exception applies. *See* Open Records Decision No. 346 (1982).

Because the potential opposing parties here have taken no concrete steps toward litigation, but have merely threatened to bring a law suit, we conclude that the school district has not established that litigation is reasonably anticipated. Accordingly, the school district may not withhold the report based on section 552.103 of the Government Code.

Section 552.107(1) states that information is excepted from required public disclosure if

it is information that the attorney general or an attorney of a political subdivision is prohibited from disclosing because of a duty to the client under the Rules of the State Bar of Texas.

Although section 552.107(1) excepts information within rule 1.05 of the Texas State Bar Disciplinary Rules of Professional Conduct, the rule cannot be applied as broadly as written to information that is requested under the Open Records Act. Open Records Decision No. 574 (1990) at 5. To prevent governmental bodies from circumventing the Open Records Act by transferring information to their attorneys, section 552.107(1) is limited to material within the attorney-client privilege for confidential communications; "unprivileged information" as defined by rule 1.05 is not excepted under section 552.107(1). Open Records Decision Nos. 574, at 5; 462 (1987) at 13-14. Furthermore, this exception applies only to information that reveals attorney advice and opinion or client confidences. *See* Open Records Decision No. 574.

The report indicates that the school district requested your law firm to investigate the allegations in a parental complaint. The investigation report contains four parts: an "Introduction" setting forth the background and purpose of the investigation, the "Scope of the Investigation," "Factual Findings," and the "Results of the Investigation and Recommendations." You explain that:

[T]he report contains legal advice and recommendations and information intended to remain confidential under the attorney-client privilege. The report was prepared under the attorney-client privilege because of threatened litigation, the sensitive nature of the matters reviewed in the investigation, and to protect the client confidences of school employees who cooperated in the investigation.

Prior decisions of this office have determined that when an attorney in the course of representing a client prepares a report for the client, the portions of that report which contain factual information are not covered by this exception. *See* Open Records Decision Nos. 462; 429 (1985); 230 (1979); *cf.* Open Records Decision No. 80 (1975) (exception not applicable to agency report.). This is so because when an attorney collects information, that attorney is not functioning as a legal advisor, but rather as a fact-finder; thus the factual information collected by the attorney when such attorney is functioning as a fact-finder is not within the attorney-client privilege. Open Records Decision No. 462.

Much of the investigation report here is factual information that is not attorney advice or opinion. When your law firm collected this information it was functioning as a fact-finder or investigator, rather than as a legal adviser. Consequently, the school district may not withhold from required public disclosure the factual information in the report.¹

¹As mentioned above, the report contains no employee statements. However, even if the factual portions of the report were taken from an employee's statements, none of the employees who were interviewed during the investigation is a "representative" of the school district for purposes of rule 503(a)(2) of the Texas Rules of Civil Evidence. *See National Tank Co. v. Brotherton*, 851 S.W.2d 193 (Tex. 1993).

Portions of the "Results of the Investigation and Recommendations" contain legal advice and opinion; the school district may withhold from disclosure these portions. We have marked the report accordingly.

Finally, you raise section 552.111 of the Government Code which excepts from required public disclosure:

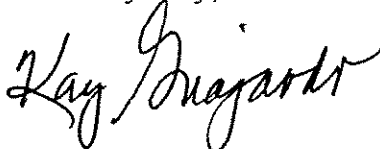
An interagency or intraagency memorandum or letter that would not be available by law to a party in litigation with the agency.

This exception applies to a governmental body's internal communications consisting of advice, recommendations, or opinions reflecting the policymaking process of the governmental body at issue. *See* Open Records Decision No. 615 (1993). This exception does not except from disclosure purely factual information that is severable from the opinion portions of the communication. *See id.*

Since the protection of section 552.111 does not extend to factual information, the protection of section 552.111 is coextensive with that of section 552.107(1) in this case. Consequently, section 552.111 applies to the portions of the report that we have determined are excepted from disclosure under section 552.107(1).

We are resolving this matter with this informal letter ruling rather than with a published open records decision. This ruling is limited to the particular records at issue under the facts presented to us in this request and may not be relied upon as a previous determination under section 552.301 regarding any other records. If you have questions about this ruling, please contact our office.

Yours very truly,



Kay Guajardo
Assistant Attorney General
Open Government Section

KHG/rho

Ref.: ID# 29563

Enclosures: Marked documents

cc: Ms. Linda Daye
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Montgomery, Texas 77356
(w/o enclosures)